Nos. 03-71066, 03-73995

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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VINODH PARSAD MAHARAJ, A71 788 923
SUNITA DEVI MAHARAJ, A72 788 924
PREETIKA MAHARAJ, A72 402 323
MEENAL MAHARAJ, A72 402 324
VINEET MAHARAJ, A72 402 325,

Petitioners,

v.

ALBERTO GONZALES, Attorney General,

Respondent.

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# PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING EN BANC

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Dated: October 11, 2005

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Pursuant to Rule 40 of the Federal Rules of Appellate Procedure, the Petitioner respectfully petitions this Court for panel rehearing of its August 4, 2005 decision in this case.

## INTRODUCTION

Panel rehearing is necessary in this case because the panel decision overlooked and misinterpreted important points of law and fact. As a result, the panel erred in affirming the decision of the BIA and the IJ. The evidence presented should have compelled a reasonable fact finder to reach a contrary result. INS v. Zacarias, 502 U.S. 478, 481 n.1 (1992). Despite the IJ's determination that Petitioner had resettled in Canada, the evidence establishes that the family had not firmly resettled in Canada. INA §208(b)(2)(A)(vi), 8 C.F.R. §208.15.

## STATEMENT OF THE ISSUES

Whether the panel erred in determining that the IJ provided substantial evidence in finding the Petitioner and his family had firmly resettled in Canada.

## STATEMENT OF THE CASE

Petitioners are husband and wife, and three minor children who appeared jointly in deportation proceedings. Vinodh Maharaj, the Principal Petitioner, is a male, native and citizen of Fiji, and all other family members proceeded through

the Principal Petitioner's application.

On or about March 29, 1991, Mr. Maharaj and his family entered the United States as visitors for pleasure from Canada near Blaine, Washington. They were authorized to remain in the United States for a period not to exceed September 28, 1991, however they remained in the United States beyond that date. They applied for asylum and withholding of removal via an I-589.

Petitioners were issued an Order to Show Cause. At the master calendar hearing on February 20, 1997, Petitioners admitted the factual allegations and conceded removability. The Petitioners did not designate a country of removal, and the court designated Fiji as the country of deportation for the Principal Petitioner, his wife, and two oldest children. Canada was designated as the country of deportation for the youngest child, since that is where he was born.

This matter came before the EOIR Immigration Court, San Francisco, Immigration Judge Brian H. Simpson presiding. On November 5, 1998, February 8, 1999, November 2, 1999, December 2, 1999, and February 10, 2000, the immigration court conducted asylum/withholding of removal proceedings, and subsequently issued its opinion. The Court denied the relief requested by the Petitioner based upon his determination that the Petitioner and his family had firmly resettled in Canada following their departure from Fiji.

Petitioner appealed the Immigration Judge's decision to the Board of Immigration Appeals. On February 27, 2003, the Board issued its per curiam decision, affirming the decision of the Immigration Judge. The Petitioners appealed to the Ninth Circuit Court of Appeals, and the Ninth Circuit denied the Petition for Review on August 4, 2005.

Mr. Maharaj based his claim of persecution on his past persecution on account of his race and religion and imputed political opinion due to his work for the Coalition Labor Party. While living in Fiji, Mr. Maharaj was employed as a bus driver (AR 469), and his wife worked as a secretary for a high school (AR 477). Following a request in March 1987 from the Coalition Labor Party, part of Mr. Maharaj's job became picking up and driving Indo-Fijians to various polling stations for the national elections in Fiji (AR 470, 474). When the election was over, Mr. Maharaj continued to drive the bus in his hometown of Nousori (AR 475). Following the coup in 1987, native Fijians were stirred to attack Indo-Fijians, and Mr. Maharaj was identified as the bus driver who had transported Indo-Fijians to the polling stations (AR 475-477). Mr. Maharaj received numerous threats from native Fijians, including a threat to burn his house down and kill his family (AR 475).

Shortly after the coup, the family residence was trespassed by two Fijian soldiers who demanded various items from the household (AR 477). After Mr.

Maharaj informed the soldiers that he did not have anything they demanded, they tied him to a post (AR 477-478). The soldiers then forced Mrs. Maharaj to strip down to her undergarments, took her to a busy intersection and forced her to "direct" traffic while a gun was pointed at her head (AR 478). The soldiers then left Mrs. Maharaj to walk back home (AR 478).

Having worked in a school, Mrs. Maharaj had assisted in the voting process (AR 483-484). Shortly after there house was raided, Mrs. Maharaj was walking to her school one morning when she was assaulted by Fijian soldiers, dragged to a nearby building and raped at gunpoint (AR 483-484). The attack left her with a fractured right arm, bruises, cigarette burns and facial lacerations (AR 484-485, 565). She was taken to the police station to report the rape, but the station was manned by a Fijian soldier who made it clear to her that she should not report the attack or go to the hospital (AR 484). She was also told to go back to India (AR 566). The following day, Mrs. Maharaj went to the hospital but was refused treatment and turned away by another Fijian soldier (AR 485), who told her that the hospital was not for Indians (AR 566). Mrs. Maharaj eventually had her fracture set by a neighbor who worked as a midwife (AR 566).

In June or July of 1987, Mr. Maharaj was the victim of a vicious attack at the hands of native Fijians while driving his bus (AR 485). His assailants beat him while other native Fijians who were passengers on the bus watched (AR 485-486).

The attack left Mr. Maharaj with broken ribs and a sore jaw, and he required medical treatment for his injuries (AR 486-487). When Mr. Maharaj attempted to report the assault to police, he was told that this was not his country and he should get out or be killed (AR 486).

In August of 1987, native Fijians made good on their threat to Mr. Maharaj, and burned his rental home down (AR 489-490). His wife sustained injuries in the fire to her stomach and hands (AR 521), and the family was forced to seek refuge at a neighbor's house (AR 491).

The threats and harassment Mr. Maharaj endured at his job continued (AR 518), and Mr. Maharaj was hindered in his efforts to practice Hinduism, as frequently Hindu prayer meetings would be broken up and the participants would be locked in cells and beaten (AR 495). Out of fear for their safety and for that of their children, in November of 1987, the family left Fiji and fled to Canada, where Mr. Maharaj had a sister (AR 491). While in Canada, the Petitioners filed an application for asylum, however four years later, the Petitioners still had not been interviewed (AR 468-469, 505). When they entered the United States, the asylum application was still pending. Since that time, however, the asylum application has been denied.

The Petitioners never felt settled in Canada (AR 508), as they were continually discriminated against while staying there, and were impeded in their

efforts to find gainful employment. The employment they were offered were menial, while non-Indians were obtaining more rewarding positions and employment opportunities (AR 575-577). Mr. Maharaj had to work as a janitor (AR 506), and his wife worked at a home for the elderly, where she was typically assigned extremely unpleasant tasks (AR 507, 577). Because of the discrimination Petitioners experienced and because after four years they still had not been interviewed for asylum, Petitioners came to the United States in March of 1991 (AR 464-465).

Principal Petitioner continuously receives reports from friends and relatives regarding the extremely poor treatment still befalling Indo-Fijians at the hands of the Fijian government and native Fijians (AR 494-495). Since native Fijians subsequently carried out a threat to burn down Mr. Maharaj's house, there's no reason why they would not fulfill their threat to kill his family (AR 491). Consequently, Mr. Maharaj fears for his safety and for that of his family should they return to Fiji (AR 491, 493).

**1. The Immigration Judge did not have substantial evidence to allege that the Petitioners had resettled in Canada.**

Petitioner was found credible, thus all facts established by his testimony and I-589 must be taken as true, and it may be concluded that he has a well-founded

fear of persecution. Mr. Maharaj testified that he and his family have been accosted and attacked in Fiji on account of his religion and race. The IJ determined, however, that based upon the family's stay in Canada, they had resettled there.

**Petitioners never received an offer of permanent resident status, citizenship, or some other type of permanent resettlement.**

Section 208(b)(2)(6) of the Immigration and Nationality Act indicates that "in general" the conditions for granting asylum include a determination that the alien is a refugee, unless s/he has firmly resettled. Petitioners are refugees because despite trying to live in Canada, Petitioners did not firmly resettle in Canada. Firm resettlement is established if another nation offered Petitioners permanent resident status, citizenship, or some other type of permanent resettlement UNLESS they establish that: (1) They remained in that nation only as long as was necessary to arrange onward travel and that they did not establish significant ties in the nation; or (2) the conditions of their residence in that nation were so substantially and consciously restricted by the authorities there so that they were not in fact resettled. INA §208(b)(2)(A)(vi), 8 C.F.R. §208.15.

It must be noted that in the Immigration Court's decision affirmed by the Board, the IJ declared that refugee status "clearly was offered" to Petitioners from Canada (AR 426). In the very next sentence, the IJ stated that the Petitioners "chose not to take advantage of it, or *not wait until it was offered them.*" (AR 426).

The IJ seemed to vacillate between whether or not Petitioners were offered some sort of permanent resettlement status. The facts of this case establish that Petitioners were never *offered* any type of permanent resident status, citizenship, or some other type of permanent resettlement. In fact, since their entry into the United States, Petitioners' application has been denied by Canada.

Further, at the hearing on December 2, 1999, the IJ stated that the definition of firm resettlement "consists of an offer of permanent resident status" and the judge went on to say "well, that's not the case here." (AR 593). The reality was that, at best, the Petitioners had an outstanding application for asylum, which had apparently made no substantial progress before Petitioners departed Canada. They had *not* received an offer, as the application could have been denied at that time, leaving the Petitioner subject to deportation and removal from Canada. Since Petitioners never received an offer of any type of permanent resettlement, the statutory requirements of INA §208(b)(2)(A)(vi) were not met.

Petitioners presented sufficient facts to meet the statutory requirement of demonstrating that they had not resettled per 8 C.F.R. §208.15, INA §208(b)(2)(A)(vi). The only "tie" Petitioners had in Canada was Mr. Maharaj's sister, who was a landed immigrant in Canada (AR 491), and she is not fairing much better than Mr. Maharaj did in her ability to resettle in Canada (AR 552). Despite having a sister in Canada, Petitioners have not established any ties in the

country, since Mr. Maharaj's sister is not a tie as she also came from Fiji and thus cannot be considered a tie to Canada itself. Additionally, Petitioners lived in Edmonton and the sister lived in Vancouver, since the family is not very close (AR 553). Consequently, any family relations that the Petitioners have in Canada are tenuous at best, and certainly cannot be considered a "tie."

Since Petitioners have no equities in Canada, no friends, no employment, and they own nothing in Canada (AR 550-552) they have established no "ties" in Canada in any meaning of the word. The IJ improperly ignored the Petitioners' credible testimony and facts in the record supporting their claim that they were not resettled and the IJ wrongfully made an adverse finding on this issue. The Service was unable to articulate any ties that Petitioners have supposedly established in Canada, and it would be improper to conclude that they resettled on this basis.

**The conditions of Petitioners' residence in Canada were so substantially and consciously restricted by the authorities there so that they were not in fact resettled.**

Petitioners never felt economically secure in Canada (AR 553-554). In determining if the conditions of their residence were so restricted that they were not resettled the Court is to consider the living conditions of other residents as compared to the Petitioners, the type and extent of housing and employment opportunities, and amongst other factors, the right to enjoy the privileges and rights

of the country including, education, public relief, and naturalization. 8 C.F.R. §208.15(b).

The IJ failed to analyze whether or not the Petitioners firmly resettled in Canada. Although they attempted to live in Canada, they did not establish ties in Canada, and the authorities substantially and consciously restricted the conditions of their residence by waiting over four years to interview them on their asylum application and condoning the discrimination against them and failing to enforce laws prohibiting discrimination. As such, the government restricted the conditions of Petitioners' residence during their time in Canada. In fact, because the Canadian government ignored the discrimination perpetrated against Petitioners, the government can be said to have prevented them from obtaining any rights, benefits or privileges of citizenship in Canada. If the government had enforced equal treatment and job opportunities for all minorities in Canada including individuals of Indian descent, then Petitioners would not have a strong argument against firm resettlement, but this is not the case. Therefore, Petitioners urge this Court to consider the special facts of this case concerning resettlement.

The IJ also failed to make a distinction between a mandatory denial of asylum and a discretionary denial of asylum. A mandatory denial of asylum is warranted only where an alien has already firmly resettled in the third country. In making a discretionary decision, the alien can be removed to a third country which

has *offered* resettlement and in which the alien would not suffer harm or persecution 8 C.F.R. §208.13. (emphasis added). As stated above, the Petitioners were never *offered* resettlement. Additionally, Petitioners have established they would be "harmed" if returned to Canada. A showing of "harm" is considerably less of a burden to show than "persecution." Petitioners testified they were subjected to considerable discrimination in the job market and treated badly by many Canadians. Petitioners' situation in terms of resettlement is unique given the amount of time which passed while still not being granted an interview for asylum. Upon the passage of four years, Petitioners no longer felt safe as they grew increasingly anxious over the status of their asylum application while in a foreign country following their flight from the atrocities they suffered in Fiji. To recover from the trauma, hatred, and physical assaults to which they were subjected while in Fiji, Petitioners desperately needed a sense of stability and acceptance in society. Petitioners found neither and there were no signs that further time in Canada waiting and working would give them the stability they were seeking. The Immigration Judge failed to take this into consideration. Upon review, it is necessary to give special consideration to Petitioners' unique circumstances while in Canada, in part because their employment situation prevented them from obtaining suitable housing and left them in dire need of economic support, and additionally, the time that elapsed while Petitioners awaited an asylum interview

caused them emotional and mental distress to a point they felt they had to relocate.

**Employment**

Petitioners were forced to work menial jobs under very unpleasant circumstances, and testified that they were treated this way because they were of Indian descent. They were not treated as Canadian citizens or in accordance with the rights they were deemed to have in Canada. With respect to their employment situation and opportunities offered to them in Canada, Mrs. Maharaj stated that they were refereed to as refugees and given the most unpleasant tasks while other people had better jobs (AR 576). Petitioners' experiences sharply contrast Canada's generically described tradition of supporting refugees, as they have specifically been denied the means to "resettle" in Canada in any practical sense, as they have not been given an opportunity to find any form of secure and stable employment throughout their four years in Canada.

The Service contends that the Petitioners were given work permits and that this indicates that they were resettled (AR 585). However, all that is important is that Petitioners demonstrate that they were unable to secure employment and note the "type and extent" of employment opportunities available. 8 C.F.R. §208.15(b). Petitioners not only demonstrated that they had no real employment opportunities as they worked menial and extremely unpleasant jobs, but also demonstrated

conclusively, that they were unable to obtain gainful employment because of their race. Because credibility was not an issue, the BIA must also find that Petitioners DID persuasively establish that they were unable to obtain suitable employment because of their race. Petitioners testified specifically to this fact and described their experiences being referred to as refugees while at work and being assigned with the most unpleasant tasks available. Petitioners demonstrated that they personally were prevented from finding suitable employment. Because they were forced to accept menial employment and non-Indians were receiving better jobs and employment opportunities, Petitioners were unable to create a life for themselves while in Canada. Petitioners' living conditions in Canada were so restricted in terms of housing, economic support, and employment and other factors that they did not resettle per the meaning of INA §208(b)(2)(A)(vi), 8 C.F.R. §208.15. There is no way individuals can fairly be considered resettled if they cannot obtain gainful work or any means of realistically supporting themselves.

**2. The designation of Fiji as the country of deportation for the Petitioners except Vineet Maharaj contradicts the finding that all the Petitioners were firmly resettled in Canada.**

If it was correct that the Petitioners would be safe in Canada then it was contradictory and against common sense to designate Fiji as the country of removal for all of the Petitioners except Vineet Maharaj. By the failure to review

the proper country of designation for removal, the Petitioners were denied a right to voice a preference, even if the preference would have been subsequently rejected. Accordingly, a substantial judicial error was made, thereby denying a full and proper consideration and application of the regulations.

**2. The BIA affirmed the decision of the IJ.**

The BIA affirmed the decision of the IJ per curiam. (AR 2)

**3. The Panel of the Ninth Circuit Court of Appeals affirmed the BIA's decision.**

This Court decided that the IJ had provided substantial evidence in determining that the Petitioner had firmly resettled in Canada.

## ARGUMENT

**The IJ improperly determined that Petitioners had firmly resettled in Canada.**

The Immigration Judge determined that, despite Petitioner's credible testimony, he and his family had firmly resettled in Canada. However, the Immigration Judge failed to recognize that Petitioners had not received any type of offer whatsoever from Canada regarding permanent resident status, citizenship, or some other type of permanent resettlement as required by INA §208(b)(2)(A)(vi).

Petitioners proved that they had not been offered any type of status in Canada, and in fact, since they entered the United States, their application for asylum has been denied. At most, they were forced to wait in Canada for four years to even get an asylum interview. During that four years, Petitioners were not offered any type of permanent resident status and the conditions of their residence in Canada were both substantially and consciously restricted by government action and inaction. However, since Petitioners were never offered any type of permanent resettlement status, they are not even required to establish that either they remained in Canada only as long as was necessary to arrange onward travel and that they did not establish significant ties in the nation, or that the conditions of their residence in Canada were so substantially and consciously restricted by the authorities there so that they were not in fact resettled. Since they did not even satisfy the first prong of being offered permanent resident status, they are not required to establish anything further.

However, even if it is determined that they *were* offered permanent resident or resettlement, Petitioners proved that they did not establish significant ties in Canada, since the only family Petitioners had living there was the lead Petitioner's sister, who was a landed immigrant in Canada. Despite having a sister in Canada, Petitioners have not established any ties in the country, since Mr. Maharaj's sister is not a tie as she also came from Fiji and thus cannot be considered a tie to Canada

itself. Additionally, Petitioners lived in Edmonton and the sister lived in Vancouver, since the family is not very close.

Further, the conditions of Petitioners' residence in Canada were so substantially and consciously restricted by the authorities there so that they were not in fact resettled, as Petitioners were continually discriminated against while staying there, and were impeded in their efforts to find gainful employment. The employment they were offered was menial, while non-Indians were obtaining more rewarding positions and employment opportunities. Lead Petitioner had to work as a janitor, and his wife worked at a home for the elderly, where she was typically assigned extremely unpleasant tasks. Because of the discrimination Petitioners experienced and because after four years they still had not been interviewed for asylum, Petitioners came to the United States in March of 1991.

It must also be noted that, with the exception of Vineet Maharaj, the IJ, in his decision, designated Fiji as the country of removal , completely contradicting his determination that petitioners had resettled in Canada.

## CONCLUSION

The specific arguments presented in this petition for panel rehearing are governed by the general principles presented in section 208(b)(2)(A)(vi)8 of the Immigration and Nationality Act. This Court should reconsider its panel decision

of August 4, 2005, where it improperly concluded that the IJ had based his decision on substantial evidence and overlooked the IJ's failure to recognize that Petitioners had not firmly resettled in Canada because they had never been offered any type of permanent resident or resettlement status. Additionally the IJ failed to recognize that Petitioners had not established any ties in Canada and further, the conditions of their residence in Canada were so substantially and consciously restricted by the authorities there so that they were not in fact resettled.

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VINODH PARSAD MAHARAJ, et al.,
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ALBERTO R. GONZALES,
Attorney General of the United States,
Respondent.

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ON PETITION FOR REVIEW OF AN ORDER OF THE
BOARD OF IMMIGRATION APPEALS

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# RESPONDENT'S BRIEF IN RESPONSE TO COURT'S SUA SPONTE INQUIRY REGARDING REHEARING EN BANC

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## INTRODUCTION

The respondent, Alberto R. Gonzales, the Attorney General of the United States, opposes rehearing. None of the grounds Maharaj advances demonstrates that the panel made an error of fact or law and, therefore, none supports his request for panel rehearing.[1] The petitioner does not suggest that the panel's decision conflicts with any other decision of this Court or that the proceeding involves a question of exceptional importance and, therefore, rehearing en banc is not warranted.[2]

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[1] The petition must state with particularity each point of law or fact that the petitioner believes the court has over overlooked or misapprehended and must argue in support of the petition.

Fed. R. App. P. 40(a)(2).

[2] An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:
(1) en banc consideration is necessary to secure or maintain uniformity of the court's decision; or
(2) the proceeding involves a question of exceptional importance.

Fed. R. App. P. 35(a). The rule further provides:

> 1. The petition *must* begin with a statement that either:
> (A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure or maintain uniformity of the

## STATEMENT

The panel denied Maharaj's petition, agreeing with the Board of Immigration Appeals that Maharaj was firmly resettled in Canada. *Maharaj v. Gonzales*, 416 F.3d 1088, 1090 (9th Cir. 2005). The panel found that, despite the lack of evidence of an offer of permanent resident status, citizenship, or some other type of permanent resettlement, Maharaj's extended, undisturbed residence in Canada raised a presumption of firm resettlement ("*Cheo* presumption") that he did not rebut. *Id.* at 1092-93 (citing *Cheo v. INS*, 162 F.3d 1227, 1229 (9th Cir. 1998); *Andriasian v. INS*, 180 F.3d 1033, 1043 (9th Cir. 1999)). The panel found the *Cheo* presumption is consistent with the Supreme Court's decision in *Rosenberg v. Yee Chien Woo*, 402 U.S. 49 (1971).

The panel found that where a petitioner has enjoyed an extended, undisturbed stay in a safe, third country, and has begun the process of applying for

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> court's decisions; or
> (B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.

*Id.* 35(b). The petition before this Court contains no statement consistent with the rule.

permanent resettlement, which he subsequently abandons or repudiates in favor of a more attractive alternative, he bears the burden to rebut the *Cheo* presumption. 416 F.3d at 1096. A petitioner cannot meet that burden by simply showing that the third country had not resolved his status before he departed; he must show that one of the exceptions to "firm resettlement" applies. *Id.* (citing 8 C.F.R. § 208.15(a)-(b)). Applying its reasoning to the record facts, the panel found that Maharaj had chosen to apply for asylum in Canada and, while the process was pending, enjoyed a sufficiently extended and undisturbed stay sufficient to establish a *Cheo* presumption of firm resettlement. 416 F.3d at 1096. The panel also agreed with the immigration judge that the facts of the case did not support Maharaj's suggestion that he was persecuted in Canada and that he had presented no other relevant evidence to rebut the presumption of firm resettlement. *Id.*

## DISCUSSION

None of the petitioner's arguments, which are no more than a disagreement with the panel's assessment of the evidence, provides a basis for rehearing by the panel or rehearing en banc.

1. Maharaj argues that the panel should rehear his case because the Immigration Judge improperly determined that he was firmly resettled in Canada.

Petition at 17. Maharaj maintains that the Immigration Judge failed to recognize that he had not received any type of offer from Canada regarding permanent resident status, citizenship, or other type of permanent resettlement. *Id.* (citing 8 U.S.C. § 1158(b)(2)(A)(vi)). Maharaj argued that the lack of an offer of permanent resettlement relieved him of the regulatory requirement to establish either of the exceptions to the firm resettlement bar. *Id.* at 18. Maharaj's petition, which simply reargues the evidence the panel already considered, ignores the panel's reasoning and the thrust of its decision.

The panel addressed Maharaj's contention, finding that the continued pendency of his Canadian asylum application was direct evidence that he had not actually received an offer of permanent resettlement. 416 F.3d at 1095 (citing *Ali v. Ashcroft*, 394 F.3d 780, 790 (9th Cir. 2005 ) (quoting *Cheo*, 162 F.3d at 1229). The panel also found that the evidence supported a finding that, in abandoning his bid for Canadian asylum, Maharaj was forum shopping and had demonstrated an economic preference for asylum in the United States. *Id.* After examining the history of the international community's policies and declarations on refugees, the nation's response, laws, and obligations, and legal precedent, the panel specifically found that indulging Maharaja's economic preference under the cover

of asylum and refugee obligations would contravene the nature of the nation's obligations and the Supreme Court's holding in *Woo*, and would undermine the integrity of the international asylum regime established by the 1967 Protocol. *Id.* at 1095-96. Maharaj has not and cannot show that the panel relied on erroneous facts, and he has made no attempt to analyze or to show that the panel's legal reasoning was wrong. Maharaj's petition simply demonstrates a disagreement with the panel's assessment of the weight of the evidence, which is not a basis for rehearing.

2. Maharaj also argues that, even if the evidence supports a conclusion that he was offered permanent resettlement, he proved that he did not establish significant ties in Canada. Petition at 18. Maharaj proffers as proof the fact that his sister is his only relative in Canada and, because she came from Fiji, she cannot be considered a tie to Canada. *Id.* Maharaj misconstrues the regulatory exceptions to resettlement. Those exceptions are only two. The first would have excepted Maharaj from the asylum bar if he had entered Canada as "a necessary consequence of his or her flight from persecution, that he or she remained in that country only as long as was necessary to arrange onward travel, and that he or she did not establish significant ties." Maharaj does not address, and the record amply

supports, the panel's finding that Maharaj did not pass through Canada, but chose Canada as his original destination for the purpose of resettlement. Maharaj remained in Canada for more than four years, during which he and his wife had another child, who is a Canadian citizen, held jobs, and sent their older children to public schools. Regardless of Maharaj's lack of family ties to Canada, the record shows that, despite his eventual disillusionment with his social and economic progress, Maharaj was not simply passing through Canada as a necessary consequence of his flight from persecution.

The second exception to the firm resettlement bar required Maharaj to show that the Canadian authorities so substantially and consciously restricted the conditions of his residence that he was not in fact resettled. Maharaj argues that he met that exception because experienced discrimination and found it difficult to obtain meaningful employment in Canada. Petition at 19. Maharaj's argument suffers two flaws. First, nothing shows that the Canadian authorities were the source of any of the difficulties he experienced. Second, his argument is nothing more than a disagreement with the panel's assessment of the weight of the evidence. It relies on neither a mistake of fact or law that is the prerequisite for a rehearing by the panel.

3. Nor is there any support for Maharaj's contention that the Immigration Judge's designation of Fiji as a country of removal contradicts his finding that Maharaj had resettled in Canada. The statute provides that the Attorney General shall remove an alien to the country the alien designates. *See* 8 U.S.C. § 1231(a)(b)(2)(A). Where an alien fails to designate a country for removal, the Attorney General is directed by statute to remove the alien to a country of which he is "a subject, national, or citizen," unless his life or freedom would be threatened in that country. *Id.* §§ 1231(b)(1)(D), (E)(3).

Maharaj did not designate a country for removal. Maharaj's removal to Fiji was not barred by subsection 1231(E)(3) because the Board had ruled any presumption of a well-founded fear of persecution was rebutted by evidence of changed country conditions in Fiji. 416 F.3d at 1091. Maharaj's petition does not challenge the finding. Therefore, the Attorney General was required to order him removed to the country of which he is "a subject, national, or citizen," Fiji and the Immigration Judge's designation of that country was not relevant to its firm resettlement finding.

4. Maharaj styles his pleading a "Suggestion for Rehearing En Banc," yet he makes no attempt to meet the prerequisites for en banc rehearing. Maharaj

does not suggest that the panel's decision conflicts with any other decision of this Court. Nor does show that the proceeding involves a question of exceptional importance. En banc rehearing, therefore, is not warranted.

The panel found that the cases holding that an offer of permanent resettlement is the determinative factor in barring asylum have also affirmed the continuing vitality of the *Cheo* presumption and *Woo*. 416 F.3d at 1094. In *Andriasian*, the Court observed that the applicable regulation mandates denial of asylum in the case of firm resettlement unless the applicant demonstrates that his third country stay lasted only long enough to arrange further travel, or that the third country conditions were unduly restrictive. *Id.* The panel pointed out that *Andriasian* generally followed the test of 8 C.F.R. § 208.15, including the two exceptions to firm resettlement, and is consistent with the Court's acknowledgment of *Woo* that refugees often make their escape from persecution in successive stages. *Id.* (Citing 402 U.S. at 57 n.6).

The panel also examined *Deqa Ali*, 394 F.3d 780, which found that the *Cheo* presumption applies only where there is no direct evidence as to whether the asylum applicant has or had the right of permanent resettlement in a third country. 416 F.3d at 1095 (citing *Deqa Ali*, 394 F.3d at 790 (quoting *Cheo*, 162 F.3d at

1229). Maharaj's Canadian asylum application, which was pending when he left, was direct evidence that he had not actually received an offer of permanent resettlement. *Id.* The panel found that applying *Deqa Ali* to Maharaja's circumstances would contradict the limited, cooperative nature of the nation's asylum obligations and the Supreme Court's holding in *Woo*, because forum shopping, like Maharaj's, undermines the integrity of the international asylum regime established by the 1967 Protocol, and indulging Maharaj's economic preference for the United States would be contrary to the nation's treaty obligations. *Id.* at 1095-96. The panel's decision in this case is consistent with *Woo* and with this Court's decisions in *Andriasian* and *Deqa Ali.*

The petitioner points to no error of fact or law in the panel's decision; the petitioner cites no precedent decision with which the panel's decision conflicts, nor identifies an exceptional issue. Neither panel rehearing nor rehearing en banc is warranted to address the petitioner's disagreement with the Board's findings of fact and the panel's assessment of the weight of the evidence supporting that decision.

## CONCLUSION

The panel's decision is consistent with this Court's precedent and rehearing is not necessary to secure or maintain uniformity of the court's decision. As explained above, the proceedings do not involve a question of exceptional importance. The Court should deny the petition.

Respectfully submitted,

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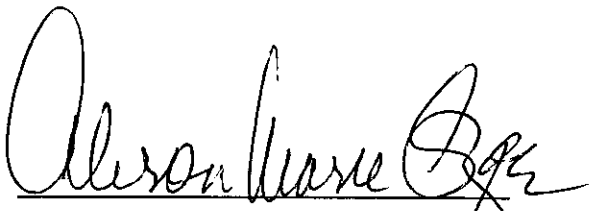

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Dated: November 8, 2005

**CERTIFICATE OF SERVICE**

I certify that on November 8, 2005, I served Vinodh Parsad Maharaj, et al., with two copies of the Respondent's Opposition to Rehearing by Federal Express addressed to his attorney:

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